# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>June 19, 2007 |
| v | No. 267566<br>Muskegon Circuit Court |
| JALVELYN MICHAEL LEE,<br><br>Defendant-Appellant. | LC No. 05-051640-FC |

Before: Kelly, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529. He was sentenced to 13 to 30 years' imprisonment. We affirm.

Two individuals robbed a gas station in Muskegon Heights during the early morning on March 21, 2005. Even though the perpetrators' faces were covered with bandanas, the gas station clerk recognized them, because they were frequent patrons.[1] The clerk testified that his identification of defendant was based on defendant's voice and eyes. Testimony also established that, while incarcerated in the Muskegon County Jail, defendant admitted that he robbed the gas station to three inmates.

Defendant argues that the prosecution failed to present evidence to prove identification beyond a reasonable doubt, because the clerk's identification, based on defendant's eyes and voice, was insufficient to sustain the conviction. We disagree.

In an appeal challenging the sufficiency of the evidence presented to sustain a conviction, this Court views "the evidence in a light most favorable to the prosecution and determine[s] whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). This Court resolves conflicts regarding the evidence in favor of the prosecution, *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997), and conflicts regarding credibility of witnesses are resolved in support of the jury's verdict, *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). This Court will not interfere with a jury's role, as factfinder, in determining

[1] The other perpetrator was tried in a separate proceeding.

the weight of the evidence or the credibility of witnesses. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Moreover, the prosecution may offer circumstantial evidence and reasonable inferences as proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Armed robbery has the following elements: "(1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute." *Id.* at 757. Identity is also an essential element of all criminal offenses. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). It is this latter element on which defendant bases his claim of insufficient evidence. An identification based on an individual's voice is permissible, so long as there was reasonably positive and certain testimony regarding some peculiarity of the individual's voice or sufficient previous knowledge by the witness of the individual's voice. *People v Hayes*, 126 Mich App 721, 725; 337 NW2d 905 (1983), citing *People v Bozzi*, 36 Mich App 15; 193 NW2d 373 (1971).

In this case, the victim's testimony was positive and unequivocal. He testified that he saw defendant four to five times a week during his shift at the gas station over a two- or three-year period. The victim testified further that he talked to defendant on several occasions, and he observed defendant's walk and mannerisms. The clerk had an opportunity to become familiar with defendant's voice, so the identification was proper. *Hayes*, *supra* at 725. Further, we note that defendant's own admissions were properly before the jury, which tended to prove defendant's identity. Those admissions, along with a surveillance videotape, corroborated the victim's testimony. Viewing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could find that defendant's identification was proven beyond a reasonable doubt. *Carines*, *supra* at 757.

In reaching this conclusion, we reject defendant's argument that the photographic identification was unduly suggestive. Defendant failed to object to the photographic identification at trial. And, on appeal, defendant did not present this question in his statement of the questions presented or discuss it in any detail. Therefore, defendant has abandoned this issue on appeal. See *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999) and *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Further, defendant has not demonstrated that this was error, which affected his substantial rights. *Carines*, *supra* at 763.

Next, defendant argues that he was denied effective assistance of counsel because defense counsel failed to use information supplied by an alibi witness, failed to file an alibi notice, failed to pursue evidence that would have demonstrated discrepancies in the identification evidence, failed to request an expert witness on the reliability of witness identification, and failed to object to the testimony of the inmates as inadmissible hearsay.

Unpreserved claims of ineffective assistance of counsel are limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). In order to sustain a claim of ineffective assistance of counsel, a defendant must prove that trial counsel's performance was deficient and that the deficiency prejudiced the defense. *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To prove defense counsel's deficient performance, the defendant must show that defense counsel's performance "fell below an objective standard of reasonableness under prevailing professional norms." *Id.* Defendant must also show that, but

for counsel's error, the result of the proceeding would have been different. *People v Hill*, 257 Mich App 126, 138; 667 NW2d 78 (2003). A defendant must also overcome "'a strong presumption that [defense] counsel's performance constituted sound trial strategy.'" *Id.*, quoting *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). And, this Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

First, defendant argues that defense counsel failed to use information supplied by an alibi witness and failed to file an alibi notice. Even if defense counsel's failure to file notice of alibi constituted inexcusable neglect, it will not warrant relief unless the defendant can demonstrate prejudice. *People v Pickens*, 446 Mich 298, 327; 521 NW2d 797 (1994). However, the record does not support defendant's assertion that an alibi witness was known to defense counsel and was available for trial, or that defense counsel "had just forgotten to file a notice of alibi." On appeal, defendant suggests that the alibi witness would present exculpatory testimony, but this Court's review is limited to the record of the trial court and it will allow no enlargement of the record on appeal. *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998), rev'd in part on other grounds 462 Mich 415 (2000). On the record, this Court cannot find that counsel's failure to present an alibi defense fell below an objective standard of reasonableness. Defendant has simply not met his burden of establishing the factual predicate for this claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Second, defendant asserts that there were discrepancies in the testimony regarding defendant's identification and that no witness immediately identified defendant. Defendant contends that defense counsel failed to pursue evidence that would have demonstrated discrepancies in the identification evidence. This argument is without merit. The victim told the police that he recognized the perpetrators immediately after the armed robbery. Further, defendant admitted that he committed the offense to three inmates, who testified at trial. And, contrary to defendant's assertions, defense counsel vigorously cross-examined the victim and the inmates. On the record, defendant has failed to overcome the strong presumption that defense counsel's actions constituted sound trial strategy under the circumstances. *Matuszak, supra* at 58. Defendant's "bare allegation" of ineffective assistance of counsel "is insufficient to make it so." *Pickens, supra* at 332.

Third, defendant asserts that defense counsel failed to request an expert witness on the reliability of witness identification. He argues that the trial court would have appointed an expert witness because he would have been unable to proceed safely to trial without one. MCL 775.15.

We reject defendant's claim that defense counsel was ineffective for failing to secure an expert witness to testify about eyewitness identifications. The argument is entirely speculative. Defendant has not demonstrated that an expert would have been retained if defense counsel moved for appointment of one. To the contrary, it appears that defendant could not meet his burden of showing the necessity of an expert. *People v Tanner*, 469 Mich 437, 443; 671 NW2d 728 (2003). Defense counsel is not required to bring a frivolous motion. *Riley, supra* at 142. Further, with our review limited to the existing record, *Matuszak, supra* at 48, we find that defendant has not overcome the presumption that counsel may have declined to request an expert witness as a matter of trial strategy. *Rockey, supra* at 76. The alleged failure to request an expert

witness did not deprive defendant of a substantial defense because defense counsel was able to pursue other available methods for attempting to discredit the clerk's identification testimony.

Finally, defendant argues that he was denied effective assistance of counsel because defense counsel failed to object to the testimony of the inmates as inadmissible hearsay. Defendant failed to object to the testimony at trial. On appeal, defendant did not present this question in his statement of the questions presented or discuss it in any detail. As such, we need not consider this question. See MCR 7.212(C)(5); *Miller*, *supra* at 172; *Kelly*, *supra* at 640-641. Nevertheless, this argument has no merit, because the challenged testimony was admissible pursuant to MRE 801(d)(2)(A), as an admission by a party defendant.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Michael R. Smolenski